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No. 87-423

In The

Supreme Court of the United States

October Term, 1987

C. WILLIAM GARRATT and
GARRATT & MORRIS, P.C.,

Petitioners,

vs.

INVST FINANCIAL GROUP, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I

DID THE COURT OF APPEALS ERR IN AFFIRMING THE DISTRICT COURT'S IMPOSITION OF SANCTIONS UPON PETITIONER UNDER FED.R. CIV.P. 11 FOR FILING AN UNTIMELY AND LEGALLY INSUFFICIENT MOTION TO RECUSE THE PRESIDING DISTRICT COURT JUDGE FOR ALLEGED BIAS OR PREJUDICE DIRECTED AT PETITIONER AS COUNSEL FOR A PARTY DURING THE COURSE OF JUDICIAL PROCEEDINGS?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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[1] The underlying action out of which this Petition grew was filed by Respondent as Plaintiff in the United States District Court for the Eastern District of Michigan. *INVST FINANCIAL GROUP, INC., a Michigan Corporation, Plaintiff v CHEM-NUCLEAR SYSTEMS, INC., a Washington Corporation, Defendant,* No. 83-CV-2217-DT. Ultimately, a Default Judgment was entered against the Defendant, Chem-Nuclear Systems, Inc. and sanctions were imposed pursuant to Fed.R.Civ.P. 11 personally

(Continued on following page)

STATUTORY PROVISIONS AND COURT RULES INVOLVED

Fed.R.Civ.P. 11 is set forth as Appendix a.

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STATEMENT OF THE CASE

Petitioner's Statement Of The Case omits several key points relating to this Petition, and therefore Respondent must present its own statement of the case.

Chem-Nuclear Systems, Inc., a subsidiary of a multinational waste disposal firm, Waste Management Corporation, agreed to pay Respondent, Invst Financial Group Inc., ("Invst") a finder's fee for introducing Chem-

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(Continued from previous page)

upon the Petitioner, C. William Garratt, as trial counsel for Chem-Nuclear. Chem-Nuclear Systems, Inc. took an appeal from the Default Judgment to the United States Court of Appeals for the Sixth Circuit, Appeal No. 85-1731. Petitioner, C. William Garratt filed two (2) appeals with respect to the District Court's rulings, the first of which, No. 85-1732, was dismissed on December 9, 1985 for untimeliness and Garratt's lack of standing to challenge the merits of Orders denying his Motions to disqualify the Hon. Horace W. Gilmore as presiding Judge over the District Court action. His second Notice of Appeal, Appeal No. 85-1888, sought review of the final Order imposing monetary sanctions upon him and was captioned in the Sixth Circuit as *In Re: C. WILLIAM GARRATT and GARRATT & MORRIS, P.C.* That appeal was argued before the Sixth Circuit at the same time as Chem-Nuclear's No. 85-1731 but a Sixth Circuit interim Order refrained from consolidating the appeals. Nevertheless, in its Opinion the Sixth Circuit treated the two matters as "a consolidation of two cases which arose out of a common set of facts". 815 F.2d 391, 394; A-2.

Pursuant to S.Ct.R. 28.1, Respondent declares it has no parent, subsidiary or affiliate corporations.

Nuclear to corporate merger or acquisition candidates. After Invst introduced Chem-Nuclear to a company called Hanchar Industrial Waste Management, Inc., a dispute arose over whether a finder's fee was owing Invst. The underlying suit was then initiated by Invst against Chem-Nuclear on June 3, 1983 in the District Court to recover the fee.

Proceedings In The District Court

Sometime after receipt of the suit papers, counsel for Chem-Nuclear, the Petitioner, C. WILLIAM GARRATT ("Garratt"), on or about August 10, 1983 phoned counsel for Respondent, Mark E. Reizen, requesting an extension of time to answer. As a professional courtesy, Reizen agreed to an extension for a reasonable but unspecified amount of time to answer only, thus indicating that under no circumstances would the extension be afforded to file motions or counterclaims. When Garratt's answer was not soon forthcoming, Reizen wrote to him on four (4) separate occasions—September 7, 1983, December 1, 1983, February 3, 1984 and June 25, 1984—requesting a status report, some action or response. Garratt never responded to these written inquiries. Phone calls proved similarly unavailing. Although Reizen attempted to conduct discovery in the case, those efforts were completely frustrated by Garratt's delaying and stalling tactics.[2]

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[2] A Federal Magistrate entered three (3) separate Orders compelling Chem-Nuclear to file meaningful responses to Respondent's initial set of Interrogatories, and two (2) of those Orders impose monetary sanctions for dilatory tactics. Garratt effectively, therefore, never provided any meaningful discovery while the case was pending in the District Court and further failed to file a witness list by September 15, 1983, as required by the District Court's Pre-Trial Order.

Finally, on June 25, 1984, Reizen revoked all extensions of time with respect to all aspects of the case. He stated,

> Discovery in this matter on behalf of your client has been dilatory at best, and it appears that I will no longer be able to accommodate you with requests for extensions of time with regard to any matter on this file. From this point onward, I expect timely responses to all pleadings filed in this matter and I will not hesitate to seek the Court's protection from this point onward.

(The Trial Judge read this letter into the record on November 15, 1984, Tr. 8-9).

Having gained tactical advantage through obfuscation and delaying tactics, Garratt thereafter, on October 3, 1984, filed an answer *with counterclaims* on the eve of trial (set for January, 1985) and some three (3) weeks before discovery cut-off (November 1, 1984). Respondent promptly moved to strike these pleadings because no Order of extension had been presented or entered which would permit Chem-Nuclear to plead *sixteen (16) months* after service, and because counsel for Respondent had long since (some three (3) months earlier) explicitly revoked any extensions of time earlier provided as professional courtesies to Garratt.

The District Court, the Honorable Horace A. Gilmore, heard the Motion to Strike on November 15, 1984 and explicitly determined that there was no excuse for the failure of Garratt to file a responsive pleading for over sixteen (16) months or to seek an out of time enlargement to plead pursuant to Fed.R.Civ.P. 6(b)(2). In the terms of that Rule, the District Court determined that there was "no excusable neglect" for Garratt's conduct. Moreover,

the District Court further found that counsel for Respondent had, at least as of the date of the June 25, 1984 letter, clearly terminated any consent to further extensions of time for Chem-Nuclear to plead. Finally, Judge Gilmore citing this Court's decision in *Link v. Wabash RR.*, 370 U.S. 626 (1962), rejected Garratt's suggestion that his professional negligence should not be imputed to his client, Chem-Nuclear. In view of this, the District Court struck the tardy answer and counterclaims and subsequently entered Default on January 17, 1985.

Thereafter, Garratt greatly multiplied the proceedings and ultimately was sanctioned for his conduct in that regard. Due to a death in the District Judge's family, an Order striking the pleadings pursuant to the November 15th ruling was not entered until November 30, 1984. This interlude gave Garratt an opportunity to file a Motion to Dismiss for Insufficiency of Service Process and a Motion for Summary Judgment and/or Judgment on the Pleadings.[3] Respondent, Invst moved the District Court for entry of default and default judgment on December 5, 1984 and opposed Garratt's Motions to Dismiss and for Summary Judgment contending they were frivolous. Invst's Motion for Default and Default Judgment and Garratt's Motion to Dismiss and for Summary Judgment were set down for hearing for January 17, 1985.

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[3] In all likelihood, these papers could never have been filed with the District Court Clerk if the Order striking the pleading had been promptly issued in due course since Chem-Nuclear would have been effectively in a state of default. Further, Invst was prohibited from obtaining a clerk's entry of default because the clerk found Garratt's stricken answer and later his Motion to Dismiss extant in the Court's file.

Before argument began on the pending Motions that were called on January 17, 1985, Garratt's partner, without any supportive papers or affidavits and without any prior notice to opposing counsel or the Court, announced that he was orally moving for recusal of Judge Gilmore and was doing so because a "respected attorney" in the Detroit area had wanted to make the Motion but was indisposed. The Court summarily denied that Motion for Recusal because it was orally made and unaccompanied by an affidavit as required by statute, 28 U.S.C. § 144.

The District Court then turned its attention to the pending Motions and heard argument on the same. With respect to Garratt's Motion to Dismiss for alleged insufficiency of service of process brought under Fed.R.Civ.P. 12(b)(5), the District Court characterized it as "outrageous". Garratt had already filed an answer and counterclaims on behalf of Chem-Nuclear which had not raised any such defenses. Only after those pleadings were stricken, did Garratt attempt to argue that Chem-Nuclear had merged into a wholly owned subsidiary of its parent company, no longer existed and therefore was incapable of receiving service of process. The District Court stated that it did not understand how an officer of the Court could say two things so completely contrary within the space of six (6) weeks. Relying on the express provisions of Fed. R.Civ.P. 12(h)(1), the District Court determined that the claim of insufficiency of service of process had not been raised in a timely manner, clearly had been waived and further concluded that the argument had not been made in good faith and was "outrageous".

With respect to Garratt's Motion for Summary Judgment, much of it reiterated the contentions made in the

Motion to Dismiss. The District Court rejected the remainder of the arguments concerning that motion because Chem-Nuclear's answer had been stricken. It reasoned that Chem-Nuclear was precluded from defending in summary proceedings because its procedural default prohibited it from contesting the merits of liability at trial.

The District Court also determined that Rule 11 sanctions were warranted, characterizing Garratt's Motion to Dismiss "outrageous" in the face of the explicit waiver provisions of Rule 12(h)(1). The District Court also deemed that the Motion for Summary Judgment was sanctionable, reasoning that if a party was foreclosed from contesting the merits of an action in view of a procedural default, it follows, *a fortiori*, that party will necessarily be foreclosed from contesting the merits of the case via the summary judgment device.[4] A hearing on the Default Judgment was adjourned for one (1) week, *i.e.*, until January 24, 1985, and the Court determined it would conduct a hearing on a Petition for Rule 11 sanctions in two (2) weeks, *i.e.*, January 31, 1985.

When the case was called on for the Default Judgment hearing on January 24, 1985, Garratt's partner, again without prior notice to counsel or the Court, sought to address the recusal of Judge Gilmore from presiding over the case for a second time. This time, Garratt filed a

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[4] *See Thomson v. Wooster*, 114 U.S. 104, 114 (1885) (default absolutely bars and precludes defendant from alleging anything in derogation of, or in opposition to plaintiff's claims); *Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 186 (7th Cir. 1982) (court refuses to consider motion for directed verdict at close of default judgment damages hearing because, *inter alia*, such would reopen the question of liability foreclosed by entry of default).

lengthy written application accompanied by two (2) affidavits: one of Garratt as counsel for Chem-Nuclear, and another signed by various attorneys in his office. Garratt's affidavit merely alleged, in conclusory terms, that Judge Gilmore had made erroneous rulings against him and the attorneys in his law firm in this and other actions. Garratt also disclaimed that he had acted in bad faith or had violated Rule 11. The second affidavit, again in conclusory fashion, communicated the subjective belief of the attorneys in Garratt's firm that Judge Gilmore was biased and prejudiced against Garratt.[5] No affidavit of a "party", *i.e.*, of any representative or officer of Chem-Nuclear, was presented with the application.

Judge Gilmore immediately referred the matter pursuant to 28 U.S.C. § 144 to another Judge, the Honorable Robert DeMascio, who was chosen by a blind draw system to hear the matter. Judge DeMascio expeditiously dealt

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[5] Incredibly, Garratt also attempted thereafter to supplement the application for recusal by presenting a wholly frivolous affidavit of a licensed polygraph examiner who stated that it was her professional opinion that the lawyers in Garratt's firm believed that Judge Gilmore was biased against Garratt and his firm. Carratt also attempted to support his argument for disqualification of Judge Gilmore by attaching applications for recusal of Judge Gilmore he had filed in three (3) previous cases. However, as pointed out by Respondent in its papers opposing the application, Garratt completely failed to advise in his application that District Judges Ralph Guy and James P. Churchill ultimately denied Garratt's Motions to Disqualify in two (2) of the cases to which he made reference. In the third, Judge Gilmore voluntarily recused himself stating that he had no bias against Garratt, but believed an appearance of impropriety might arise because he had disqualified Garratt and his firm from representing a party due to their involvement as witnesses in another case which was on appeal. *See* 815 F.2d 391, 396 n.1; A-6 n.1.

with Garratt's Motion for Disqualification finding it clearly unmeritorious under controlling precedent. (His February 21, 1985 Order is included herein as Appendix b). Judge DeMascio determined that all the allegations of bias against Garratt concerned judicial actions taken by Judge Gilmore in the present and past cases—actions which were legally insufficient to require disqualification under *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980). Judge DeMascio also determined that the Motion represented yet another demonstration of a lack of good faith in defending the action warranting Rule 11 sanctions, the imposition of which was more properly left to Judge Gilmore.

Subsequent to Judge DeMascio's denial of the Motion for Disqualification, the Court and the parties again turned to the matter of sanctions. Garratt continued to file voluminous supplemental briefs and motions until his client Chem-Nuclear retained new counsel on April 3, 1985. On April 18, 1985, Judge Gilmore conducted a hearing with respect to sanctions wherein Chem-Nuclear was represented by new counsel and Garratt was represented by counsel of his choice. Garratt and his counsel were given every opportunity to present any matters with respect to sanctions at that hearing. After Garratt's counsel had made a presentation, and after argument had been heard from all counsel involved, Judge Gilmore determined that sanctions should be imposed personally upon Garratt for filing the Motions to Dismiss, for Summary Judgment and for Disqualification. The matter of amount of the sanctions to be imposed was referred to a United States Magistrate to act as a Special Master under Fed.R.Civ.P. 53. The Magistrate conducted a hearing over two (2) trial days with Garratt being represented by counsel. Counsel had

the right to, and did cross-examine counsel for the Respondent and further called witnesses and presented extensive documentary evidence and written argument. Thereafter, the Magistrate recommended sanctions be imposed in the amount of $14,238.75. After yet another hearing with Garratt having a full and adequate opportunity to appear and be heard through counsel, Judge Gilmore reduced the Magistrate's award to $14,167.50.

On August 8, 1985, Default Judgment was entered in favor of Invst against Chem-Nuclear. Chem-Nuclear appealed the entry of Default Judgment via a timely Notice of Appeal. On October 9, 1985, Judge Gilmore entered an Order for Payment of Actual Attorney Fees to Invst in the amount of $14,167.50 against Garratt to which he filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit.

Proceedings In The Court Of Appeals

After Chem-Nuclear secured new counsel, it explicitly elected not to appeal the Motion to disqualify Judge Gilmore that had been filed by Garratt on its behalf. Garratt unsuccessfully attempted to seek review on the merits of the disqualification orders.[6]

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[6] By a separate appeal, No. 85-1732, filed on September 18, 1985, Garratt attempted to appeal Judge Gilmore's denial of Garratt's oral Motion for Recusal made on January 17, 1985 and of Judge DeMascio's February 21, 1985 Order denying Garratt's written Motion to Disqualify Judge Gilmore. The Sixth Circuit, in an Order dated December 9, 1985 (Appendix c), dismissed Garratt's appeal for untimeliness and for lack of standing to challenge the merits of the disqualification Order.

The Chem-Nuclear Appeal

With respect to the merits of Chem-Nuclear's appeal, the Sixth Circuit, in a reported opinion, 815 F.2d 391, 397-400 (6th Cir. 1987); A-8 to A-15, reversed entry of the Default Judgment and remanded the case to the District with directions to set aside the Default, to reinstate Chem-Nuclear's Answer and for further proceedings.[7] Respondent

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[7] The Court of Appeals readily acknowledged that the District Court found that Garratt's *sixteen (16) month* delay in failing to plead or to seek an extension of time under Fed.R.Civ.P. 6(b)(2) was "inexcusable". *See Sony Corp. v. Elm State Electronics, Inc.*, 800 F.2d 317, 319 (2d Cir. 1986) (party seeking enlargement under Rule 6(b) must establish "excusable neglect"); *Traguth v. Zuck*, 710 F.2d 90, 93-94 (2d Cir. 1983) (same); *In Re: Sonoma V*, 703 F.2d 429, 431-32 (9th Cir. 1983) (same); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 130 F.2d 185, 187 (3d Cir. 1942) (en banc) (obtaining an enlargement order under Rule 6(b) necessary even when extension is granted by adverse party). Nevertheless it vacated the Default Judgment, expressing its strong disfavor of pretermitted proceedings.

Relying upon its own decisions in *Shepherd Claims Services Inc. v. William Darrah & Assoc.*, 796 F.2d 190 (6th Cir. 1986) and *United Coin Meter Co. v. Seaboard Coastline RR.*, 705 F.2d 839 (6th Cir. 1983), the Sixth Circuit concluded that all ambiguous or disputed facts had to be construed in a light most favorable to the defaulted party and that any doubt had to be resolved in favor of that defaulted party. 815 F.2d at 397-398. While the District Court had determined that the Respondent's counsel's June 25, 1984 revocation of extensions "as to any matter on this file" was unambiguous, the Court of Appeals panel engaged in *de novo* review and determined that the letter was ambiguous, apparently because it was written in the context of a discovery dispute. 815 F.2d at 399-400; A-13. The panel reached this conclusion without making reference to the District Court's supplemental reliance upon Respondent's counsel's other letters of September 17, 1983, December 1, 1983 and February 3, 1984 as well as upon Garratt's numerous oral promises representing he would file responsive pleading.

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must submit that the Court of Appeals ruling with respect to vacating the Default Judgment was erroneous, represents an unwholesome "sporting chance" theory of procedure and encourages a degree of laxity and unprofessional conduct on the part of counsel which has never been recognized by this Court. Indeed, the Sixth Court's employment of a standard of review that is highly deferential to the defaulted party (as opposed to the District Court) has specifically been rejected by recent decisions of other Courts of Appeals. *See Tolliver v. Northrop Corp.*, 786 F.2d 316 (7th Cir. 1986); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1095-06 (7th Cir. 1984); *United States v. DeFrantz*, 708 F.2d 310 (7th Cir. 1983); *Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182 (7th Cir. 1982). *See also Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), *amended*, 807 F.2d 1514 (9th Cir. 1987); *Dimmitt & Owens Finc., Inc. v. United States*, 787 F.2d 1186, 1192-93 (7th Cir. 1986). Moreover, when a party has been sanctioned for dilatory tactics as Garratt was here, whether by default, dismissal or other sanction, this Court has been insistent that the District Court's decision be narrowly reviewed by any appellate court under a highly deferential standard—a standard which recognizes the deterrent function such

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In view of the purported ambiguity found by the Court of Appeals, it determined that the Default Judgment had to be vacated to "prevent manifest injustice". 815 F.2d at 400; A-14. Somewhat surprisingly, the panel did this in the context of forthrightly acknowledging that Garratt had been "careless and negligent" 815 F.2d at 400; A-14 and further that he had abused professional courtesies graciously extended to him by counsel for Respondent to the extent of rendering the Federal Rules of Procedure meaningless. *Id.*

sanctions are to generally play within the federal court system. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 641-643 (1976). *See also Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxite de Guinee*, 456 U.S. 694, 707-709 (1982); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763-764 (1980).[8] Although the Respondent believes that the Court of Appeals erred in reversing the Default Judgment, Respondent has subse-

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[8] Respondent must note that the Court of Appeals leniency with respect to Garratt's admitted professional negligence in failing to plead for over sixteen (16) months was erroneous if only because of its *de novo* review of the record on the pretext that it was not necessary to show a "glaring" abuse of discretion to upset a Default Judgment. *See* 815 F.2d at 397-399. If nothing else, this action contravened decisions of this Court which strongly defer resolution of factual matters, including imposition of ultimate sanctions, as peculiarly within the District Court's charge and expertise—undertakings which conversely cannot, and should not be duplicated by appellate courts reviewing cold records. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 641-43 (1976) (court of appeals reversed by this Court for leniency evidenced in its opinion reversing a district court's dismissal under Rule 37 as too severe a sanction); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986) (*National Hockey* establishes that ultimate sanction entered by district court is protected by "highly deferential review" by appellate courts). *See also Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1511-12 (1985) (appellate court is not to second guess a district court as to factual matters and must affirm factual findings absent their being clearly erroneous); *Brown v. Wesley's Quaker Maid, Inc.*, 771 F.2d 952, 956 & n.4 (6th Cir. 1985), *cert. denied*, 107 S.Ct. 116 (1986) (same).

These decisions establish the narrow scope of review that should have been employed by the panel with respect to the Default Judgment. Of even greater significance, they underscore the fact that the Sixth Circuit gave Garratt the benefit of every doubt in rendering its opinion—affording him far more protection than he deserved or was entitled to—and still determined that his conduct in filing the Motion to Disqualify Judge Gilmore was unquestionably sanctionable.

quently resolved its dispute with Chem-Nuclear in the underlying District Court action which has been dismissed with prejudice pursuant to a settlement between those parties.

The Matter Of Sanctions

The Court of Appeals then turned its attention to the matters of sanctions against Petitioner, Garratt. The Court initially noted that once a violation of Fed.R.Civ.P. 11 was found, the District Court was required to impose sanctions under Rule 11 as modified by its 1983 Amendments. 815 F.2d at 391; A-17, *citing, Albright v. Upjohn Co.*, 788 F.2d 1217, 1221-22 (6th Cir. 1986); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985); *Davis v. Veslan Enterprises,* 765 F.2d 494, 497 (5th Cir. 1985); advisory committee notes to 1983 amendments to Rule 11. Although the panel recognized the District Court's imposition of sanctions was to be reviewed under the limited abuse of discretion standard, 815 F.2d at 401-402; A-17, it nevertheless engaged in a careful—and what was tantamount to a *de novo*—review of the record regarding sanctions.

With respect to Garratt's Motion to Dismiss for Insufficiency of Service of Process under Fed.R.Civ.P. 12(b)(5), the panel readily determined that "even a cursory review of Rule 12 would have revealed the defense lacked any foundation in law" and affirmed Judge Gilmore in properly sanctioning Garratt for filing it. 815 F.2d at 403; A-20. The Court also determined that Judge Gilmore's characterization of this argument as "outrageous" constituted an understandable response to a Motion that was patently without merit. 815 F.2d at 402-03; A-19, 20.

The Sixth Circuit reversed entry of sanctions against Garratt for filing the Motion for Summary judgment, reasoning that although Garratt's pleadings had been stricken at the time he filed the Motion for Summary Judgment on November 30, 1984, the Motion for Summary Judgment did not violate any procedural rule and raised potentially meritorious defenses. Accordingly, it determined that sanctions were not appropriate with respect to that Motion.[9] Respondent has not elected to burden this Court with a cross-petition for certiorari challenging this ruling because this case simply does not warrant review of any type in this Court.

As Garratt has not elected to petition this Court to review the Court of Appeals' affirmance of the sanction imposed upon him for filing the clearly frivolous Motion to Dismiss, the only aspect of the Court of Appeals' ruling that is before this Court is the Sixth Circuit's affirmance of District Judges Gilmore's and DeMascio's sanctioning Garratt for filing the clearly frivolous Motion for Disqualification of Judge Gilmore. In its ruling, the Sixth Circuit recognized that Rule 11 as amended requires the imposition of sanctions when a pleading, motion, or other court paper 1) is not well grounded in fact; 2) is not warranted by existing law or a good faith argument for extension of existing law; or 3) is filed for an improper purpose such as delay. The Court found that Garratt's Mo-

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[9] Respondent continues to maintain that because Chem-Nuclear's pleadings had been stricken such that it was unable to defend as to the merits of the suit, Chem-Nuclear was in a state of default which precluded Garratt from filing a Motion for Summary Judgment. *See Thomson v. Wooster,* 114 U.S. at 114; note 4 *supra*.

tion for Disqualification violated all three (3) sanctionable circumstances of Rule 11. 815 F.2d at 402; A-18. First, the Motion was not well grounded in fact because Garratt advanced no new facts or legal arguments to support the Motion. In fact, the panel found it to be identical to ones that had been filed in other cases and denied by Judges Guy and Churchill.

Second, the Court of Appeals also readily determined that Garratt's Motion was not warranted by existing law or a good faith argument for extension of existing law. The explicit holding of *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) required proof of extrajudicial prejudice or bias thus rendering irrelevant the actions of a judge in pending or previous litigation as grounds for disqualification. 815 F.2d at 402; A-19. Garratt's motion supported by his own conclusory affidavits flagrantly ignored this clearly controlling precedent. Garratt's citation of cases that he contended represented an exception to this general rule were readily rejected by the Court of Appeals as not remotely similar factually. 815 F.2d at 402-403; A-19, 20. The fact that Judge Gilmore commented that certain of Garratt's legal arguments were "outrageous"—and in fact were outrageous—wasn't remotely similar to the injudicious comments made in the cases Garratt purported to rely upon.

Third, as anyone familiar with the record would have to conclude, the panel quickly determined that Garratt transparently filed the Motion for Disqualification to delay the Default Judgment hearing. 815 F.2d at 402; A-18. The Court also recognized that Garratt's Motion was un-

timely since it was brought not at the beginning, but at the conclusion of the case. 815 F.2d at 402; A-18.

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REASONS WHY THE WRIT SHOULD BE DENIED

Introduction

Garratt now seeks review in this Court of the award of sanctions against him for filing the Motion to Disqualify Judge Gilmore raising yet another frivolous claim (Pet. for Cert. Question 1) that such violates his First and Fifth Amendment rights guaranteed by the Constitution of the United States. He also reiterates his argument (Pet. for Cert. Question 2) made to the Court of Appeals that his Motion for Disqualification of Judge Gilmore was justified in view of his self-serving declaration of actual or apparent bias or prejudice on the part of Judge Gilmore.

I.

THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW IN THIS COURT AND, MOREOVER, ARE FRIVOLOUS.

Initially, the Court should note that Garratt seeks review of factual determinations made by the District Court to the effect that no bias or prejudice within the meaning of 28 U.S.C. § 144, § 455 was established. In Garratt's petition for certiorari (Question 2) he seeks *de novo* review in this Court of those factual determinations claiming that bias was shown 1) by the District Judge's acceptance of Respondent's counsel's June 25, 1984 letter as unambiguously revoking any extensions of time previously ex-

tended to Garratt and 2) by the District Judge's failure to vacate the Default Judgment. Apparently, Garratt believes that because the Sixth Circuit ultimately determined that the District Judge erred in making those findings and determinations, he has established bias. This in itself constitutes yet another violation of Rule 11 since it is manifest that a judge cannot be recused because he commits error. As Circuit Judge Aldridge recently stated, "a judge cannot be acceptable if he finds in your favor, but unqualified when he finds against you. This is classic heads-I-win, tails-you-lose". *Ricci v. Key Bancshares of Maine, Inc.*, 111 F.R.D. 369, 377 (D.Me. 1986).

Garratt further compounds his lack of good faith regarding his second question presented for review by contending 3) that his Motion to Disqualify Judge Gilmore was justified in view of his claim that the Judge made a "Freudian slip" at one of the hearings by calling the case "*Invst v. Garratt Chem-Nuclear*". The official Court Reporter that transcribed the particular hearing, however, certified that the District Judge made no such statement. Although Garratt concedes this was never part of the record and indeed, that he was unsuccessful in getting the Court of Appeals to correct the record to reflect *his* recollection of how the case was called, he nevertheless continues to belabor such an irrelevancy in this the highest Court in the land.

Garratt's "constitutional issue" (Question 1) is equally meritless. Indeed, the argument that Garratt was denied the opportunity to be heard is frivolous and offered in bad faith. As the Court of Appeals expressly noted, Garratt was given far more adequate process than was due him,

815 F.2d at 405; A-24, 25, being permitted to express his views in multiple hearings before, and presentations to two (2) United States District Judges and a United States Magistrate. Indeed he retained counsel who had an unencumbered right to cross-examine Respondent's counsel, to call, examine and cross-examine other witnesses and to present documentary evidence. Further, the record in this matter is full of his prodigious written arguments and presentations. Equally outrageous is Garratt's claim of a denial of due process because Judge Gilmore acted as "accuser, fact finder, judge and executioner" (Pet. 12) in the face of the fact that one United States Magistrate, two United States District Court Judges, and a panel of the United States Court of Appeals have duly considered and rejected Garratt's contentions.

Garratt's constitutional claims under the First Amendment are not only frivolous, but hardly comprehensible. Apparently, Garratt believed he enjoys some absolute, First Amendment right to make frivolous Motions for Disqualification. He attempts to justify this belief by sweepingly grand and thunderous references to the Court of Appeals' decision precipitating an "apocalyptic" inhibition of lawyers from zealously representing their clients (Pet. 13) and of the advent of "judicial tyranny". (Pet. 20). Garratt says the Court of Appeals' ruling will also have "a chilling effect" on attorneys' zeal to represent their clients' interests. This position is untenable and begs the question. Garratt's Motion for Disqualification has been found frivolous and sanctionable by two (2) District Judges, a Magistrate and a panel of the Court of Appeals. If it is his contention that the First Amendment gives him absolute immunity to file such frivolous pleadings and to

subvert and delay the judicial process, then his understanding of that Amendment is thoroughly out of touch with any of the decisions of this Court. In fact, the 1983 Amendments to Rule 11 were actually *designed and intended* to have a "chilling effect" upon conduct such as Garratt's. This Court has on more than one occasion construed (and applauded) sanction provisions of the Federal Rules of Civil Procedures so as to serve the important deterrent function of inhibiting unacceptable delay and misconduct. *National Hockey League*, 427 U.S. at 642-43 (Rule 37 sanctions).

Correlatively, if Garratt's conention is that his Motion to Disqualify should have been granted, then his claims have nothing to do with the First Amendment but instead simply turn upon the legal sufficiency of the Motion. As the District Judges and the Court of Appeals properly found, the motion had no merit whatsoever.[10]

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[10] As earlier described, Chem-Nuclear did not appeal the merits of Judge DeMascio's denial of the Motion to Disqualify Judge Gilmore. The Court of Appeals further held in Garratt's appeal No. 85-1732 that Garratt did not have standing to challenge the merits of that Disqualification Order and did not perfect that appeal in any event. Garratt did not seek review in this Court of that ruling. Therefore, Judge DeMascio's ruling denying the Motion to Disqualify is the law of the case which cannot be reviewed by this Court. This makes Garratt's Petition particularly unsuited as a vehicle for this Court to generally discuss the interrelationship between Rule 11 and disqualification as Garratt suggests.

II.

THE COURT OF APPEALS WAS FULLY JUSTIFIED IN AFFIRMING THE IMPOSITION OF SANCTIONS AGAINST THE PETITIONER UNDER UNIVERSALLY RECOGNIZED PRINCIPLES OF LAW AND THEREFORE REVIEW IN THIS COURT IS NOT WARRANTED.

The Sixth Circuit, Judge DeMascio and Judge Gilmore relied upon the Sixth Circuit's decision in *Southerland v. Irons,* 628 F.2d 978 (6th Cir. 1980) in finding Garratt's Motion for Disqualification wanting under Rule 11. The *Southerland* case clearly had recognized the "well settled [rule] that actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification". *Southerland,* 628 F.2d at 980, *citing Sexton v. Kennedy,* 519 F.2d 797 (6th Cir. 1975); *Knoll v. Socony Mobil Oil Co.,* 369 F.2d 425, 430 (10th Cir. 1966), *cert. denied,* 386 U.S. 977 (1967); *Barnes v. United States,* 241 F.2d 252 (9th Cir. 1956). The Sixth Circuit was completely correct in its articulation of this rule and in its recognition of the fact that Garratt's effort completely ignored or discounted the universal character of its application.

To demonstrate the strength of this point, one need only look to the recent decision of *Aetna Life Ins. Co. v. Lavoie,* 106 S.Ct. 1580, 1584-85 (1986) wherein this Court recognized the traditional common-law rule that disqualification for bias or prejudice was not permitted. "As Blackstone put it, 'the law will not suppose a possibility of a bias or favour in a judge, who has already sworn to administer impartial justice, and whose authority greatly

depends upon that presumption and idea.' " *Id., citing* 3 W. Blackstone, Commentaries, * 361. This Court further noted, however, that "the more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice". *Aetna Life Ins. Co.,* 106 S.Ct. at 1585.

Aetna Life Ins. involved a challenge under the due process clause to a court's refusal to disqualify one of its justices when no intervening regulation or statute controlled the terms of such disqualification. By contrast, Acts of Congress, 28 U.S.C. § 144, § 455, far exceeding the minimal constitutional requirements of the due process clause, control the situations under which a presiding federal judge may be recused. Accordingly, it is those statutes which controlled the determination as to whether or not Judge Gilmore should have been disqualified from presiding over the underlying action and whether or not Garratt violated Rule 11 in seeking Judge Gilmore's recusal.

The plain language of those provisions, and indeed of the first clause of 28 U.S.C. § 144, establish the frivolousness of Garratt's Motion for Disqualification. 28 U.S.C. § 144 provides in part that, "[w]henever *a party* . . . makes and files a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice either against *him* or in favor of any adverse party. . . ." (emphasis supplied). As already noted, it was Garratt—the attorney for Chem-Nuclear—that filed an affidavit in this case, not a representative or officer of Chem-Nuclear.

The statute has two (2) significant ramifications with respect to its choice of the term "party". First, the plain

meaning of the literal word "party" requires that a "party", not an attorney be the affiant. Several Courts of Appeals have construed the statute's reference to "party" as not to include counsel within its sweep. *See, e.g., Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1398 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1050 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States v. IBM Corp.*, 475 F.Supp. 1372, 1383 (S.D. N.Y. 1979). *Cf. also United States ex rel. Wilson v. Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); *Giebe v. Pence*, 431 F.2d 942, 943 (9th Cir. 1970).

Second, the statute, in view of its use of the terms "bias" and "prejudice" as being the touchtones which trigger disqualification, have universally been interpreted as terms of art to refer to a judge's actions or conduct occurring outside of the performance of his or her judicial duties. As those decisions unequivocally state, the only type of bias or prejudice which will warrant disqualification is "extradjudicial" bias or prejudice. This Court squarely established such a construction when it stated that, "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case". *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966), *citing, Berger v. United States*, 255 U.S. 22, 31 (1921) (same). *See also Moore v. McGraw Edison*, 804 F.2d 1026, 1032 (8th Cir. 1986) (antipathy toward an attorney is not indicative of extrajudicial bias against a party); *United States v. Pugliese*, 805 F.2d 1117, 1125 (2d Cir. 1986); *In Re: IBM Corp.*, 618 F.2d 923, 928 (2d Cir. 1980); *Davis*

v. Board of School Commissioners, 517 F.2d at 1052 (controversy with lawyers in the matter at bar does not constitute extrajudicial conduct). The fact that the Sixth Circuit in *Southerland* followed the rule set down by this Court in *Grinnell* and *Berger* and followed by other Courts of Appeals underscores the frivolousness of Garratt's Motion.[11]

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[11] Simply put, "antipithy to an attorney is insufficient grounds for disqualification of a judge because it is not indicative of extrajudicial bias against a party". *Moore v. McGraw Edison*, 804 F.2d at 1032. Garratt's attempt to fall into some exception to this overarching principle was also frivolous. Namely, Garratt claimed two (2) decisions recognized limited circumstances where bias or prejudice directed toward an attorney might give rise to a need for a judge to be disqualified. *See* Pet. at 12, *citing, Nicodemus v. Chrysler Corp.*, 596 F.2d 152 (6th Cir. 1979); *United States v. Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, 429 U.S. 951 (1976).

Nicodemus, which was authored by Judge Keith who sat on the panel of the Sixth Circuit in this matter, determined that a district judge had to be disqualified for making flagrantly inappropriate and intemperate remarks from the bench about a *party* and its representatives. Moreover, the district judge also rendered a retaliatory award of damages against that litigant, notwithstanding his admission that such was not necessarily justified under substantive law but rather was a measure designed to punish the litigant.

Garratt's attempt to rely upon the *Ritter* decision was equally misplaced and frivolous. There, the Tenth Circuit deemed it appropriate to disqualify the district judge because, *inter alia*, he was caustic and overbearing toward counsel for the government and expressed, on the record, his belief that the recusal efforts were calculated to impugn his integrity and that of the attorney for the government's adversary, one Mr. Christensen. Christensen was President of the Utah State Bar Association and had forestalled Bar efforts to recommend impeachment and disability proceedings against the district judge. The Court of Appeals found the record full of references to Judge Ritter's extreme deference to, and protection of Christensen, as well as to the district judge's concern about the impact of the court proceedings upon Christensen's career and dealings outside of the pending case.

III.

OTHER FACTORS, NOT EXPRESSLY RELIED UPON BY THE SIXTH CIRCUIT, ESTABLISH THAT GARRATT'S MOTION TO DISQUALIFY JUDGE GILMORE WAS SANCTIONABLE UNDER RULE 11.

It is well established that a Respondent in this Court may urge on appeal reasons for affirmance not relied upon by the lower courts. *California Bankers Ass'n v. Schultz,* 416 U.S. 21, 71 (1974); *United States v. American Ry. Express Co.,* 265 U.S. 425, 435 & n.10 (1924); *The William Bagaley,* 72 U.S. (5 Wall.) 377, 412 (1866). Most significant in this regard was Garratt's patent violation of the necessity of bringing the Disqualification Motion in a timely fashion. Timeliness had squarely been laid down by Sixth Circuit as an absolute requisite to pursuing a motion to recuse in *Crowder v. Conlan,* 740 F.2d 447, 453-54 (6th Cir. 1984). Indeed, the necessity for seeking recusal at the earliest possible moment is something expressly mandated by the terms of 28 U.S.C. § 144. The observations of the First Circuit made long ago are directly apposite. "The requirement of timeliness is of fundamental importance. The first ground of the affidavit is untimely as a matter of law. *We do not see how anyone could read the statute and think otherwise.* Petitioner knew of this circumstance for two and one-half years and said nothing". *In Re: United Shoe Machinery Corp.,* 276 F.2d 77, 79 (1st Cir. 1960) (emphasis supplied). Here, Garratt claimed that Judge Gilmore was biased or prejudiced against him and that that bias or prejudice had been expressed in previous cases. Nevertheless, Garratt did not elect to bring such matters up until after his pleadings

were struck. In fact, he did not move for recusal until the very day the District Court was to have conducted the Default Judgment hearing. Again, as the First Circuit noted, "one of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives". *Id.*

Finally, it should be noted that Garratt is misplaced in his sweeping claim that absent this decision, there are no federal cases dealing with the imposition of Rule 11 sanctions in the context of filing a motion for disqualification. In *Ricci v. Key Bancshares of Maine Inc.,* 111 F.R.D. 369, 377-378 (D.Me. 1986) Circuit Judge Aldridge sitting by designation imposed sanctions for filing a similarly frivolous motion for recusal. As here, the motion for recusal was not filed until well after a pattern of dilatory tactics and delays had been established on the record. Judge Aldridge found the motion untimely and sanctionable. "In sum, the motion was both too late and too little". *Id.* Like Garratt, counsel made the argument in *Ricci* that the unprofessional conduct was justified and not sanctionable by claims of "advocacy and zeal" by the attorney on behalf of his client. This contention was squarely rejected by Judge Aldridge's observation that the legal research undertaken by the attorney "should surely have revealed, if common sense had not, the impropriety of using recusal as a second string to their bow . . . As to delay, it is only too apparent that this was the purpose [of the motion]". *Id.* Building on Shakespeare (Hamlet, IV, iii, 9) Judge Aldridge observed that "in court desper-

ate diseases are not to be relieved by desperate appliances. Sanctions are clearly in order." *Id.* at 377-78.

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CONCLUSION AND RELIEF REQUESTED

As this Response should demonstrate, two (2) District Judges and a panel of the Court of Appeals agreed that the Petitioner had to be sanctioned under Fed.R.Civ. P. 11 for filing a clearly frivolous Motion to Disqualify Judge Gilmore. Garratt's filing of the petition for certiorari may itself constitute a violation of Rule 11 as he continues to pursue, even in this Court, his frivolous arguments. Moreover, he has further demonstrated bad faith by presenting what are unquestionably frivolous constitutional arguments to which Respondent has been required to respond.

WHEREFORE, Respondent, INVST FINANCIAL GROUP, INC., prays that the Court deny the petition for certiorari and enter an order awarding Respondent costs and attorney fees.

Respectfully submitted,

BUSHNELL, GAGE, REIZEN & PATTON

By: JOHN K. PARKER (P29563)

Attorneys for Respondent

DATED: October 8, 1987

APPENDIX a

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may in-

clude an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX b

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INVST FINANCIAL GROUP, INC.,
a Michigan corporation,

Plaintiff,

v. Civil No. 83CV2217DT

CHEM-NUCLEAR SYSTEMS, INC.,
a foreign corporation,

Defendant.
_____/

ORDER

This matter is before the court on defendant's motion to disqualify the presiding judge in this action, pursuant to 28 U.S.C. § 144 (1949). Initially, we note that, under § 144 (actions of a judge in pending or previous litigation in which the movant has been involved are not grounds for disqualification. Person bias based upon extrajudicial actions must be shown. *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980).

It is clear to this court that defendant is claiming no personal bias on the part of Judge Horace Gilmore. Defendant's allegations of bias all concern judicial actions taken by the presiding judge in the present and past cases in which defendant's counsel has appeared. This is an insufficient basis for disqualification.

Additionally, we have reviewed the procedural history of this lawsuit. We are of the opinion that, in bringing this motion, defendant is compounding a demonstration of lack of good faith in the defense of this action. While we believe that this motion presents an appropriate basis for the imposition of sanctions under Fed. R. Civ. P. 11, such action is more appropriately left to the assigned judge.

NOW, THEREFORE, IT IS ORDERED that defendant's motion to disqualify presiding district judge pursuant to 28 U.S.C. § 455 [sic] be and the same hereby is DENIED.

/s/ Robert E. DeMascio
United States District Judge

Dated: Feb. 21, 1985

APPENDIX c

No. 85-1732

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:	
C. WILLIAM GARRATT, AND GARRATT & MORRIS, P.C.	
Petitioners-Appellant	
INVST FINANCIAL GROUP, INC., A MICHIGAN CORPORATION,	ORDER
Plaintiff-Appellee	(Filed Dec. 9, 1985)
v.	
CHEM-NUCLEAR SYSTEM, INC., A FOREIGN CORPORATION,	
Defendant	

BEFORE: KEITH, KENNEDY, and KRUPANSKY, Circuit Judges

This matter is before the Court upon plaintiff's motion to dismiss the appeal of William C. Garratt.

On September 18, 1985, Garratt filed a notice of appeal from the orders of January 17, 1985 in which Judge Gilmore denied Garratt's oral motion to disqualify himself and on February 21, 1985 Judge DeMascio denied

Garratt's written motion to disqualify Judge Gilmore, stating also that sanctions should be imposed on Garratt pursuant to Federal Rule Civil Procedure 11. On April 24, 1985, the district court ruled that sanctions would be imposed on Garratt and referred the matter to a United States Magistrate pursuant to Federal Rule of Civil Procedure 53. On August 6, 1985, the Magistrate recommended that sanctions be imposed against Garratt in the amount of Fourteen Thousand Two Hundred Thirty Eight Dollars and Seventy Five Cents ($14,238.75), however this recommendation was not adopted by the district court until October 8, 1985 thereby rendering Garratt's notice of appeal filed on September 18, 1985 premature since there was no final order regarding the issue to which Garratt had standing. Garratt further failed to perfect his appeal once the district court entered its final order regarding the imposition of sanctions.

It is ORDERED that the motion to dismiss be and hereby granted.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk